



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 9, 1991

Mr. J. Glen Sanford, Treasurer  
Jim Santini for Senate  
Quale Park 1  
Suite E-3A  
Las Vegas, Nevada 89106

RE: MUR 2314  
Jim Santini for Senate and  
J. Glen Sanford, as  
treasurer

Dear Mr. Sanford:

Based on a complaint filed with the Federal Election Commission on January 13, 1987, and information supplied by you, the Commission, on July 28, 1987, found that there was reason to believe Jim Santini for Senate ("Committee") and you, as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b), and 11 C.F.R. § 110.6(d)(2) and instituted an investigation of this matter. Then on January 24, 1989, the Commission found reason to believe that the Committee and you, as treasurer, violated 11 C.F.R. § 110.6(c)(3) and 2 U.S.C. § 434(b).

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

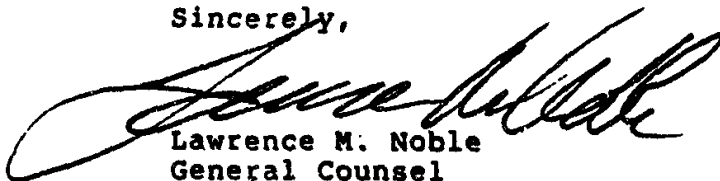
If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Elizabeth Campbell, the attorney assigned to this matter, at (202) 219-3400.

Sincerely,



Lawrence M. Noble  
General Counsel

Enclosure  
Brief

cc: James Santini

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NRSC, and initiated an investigation into this matter. On that same date, the Commission also found reason to believe that the Santini Committee and its treasurer violated 2 U.S.C. § 441a(f) for receiving excessive contributions from the NRSC transmitted to it through the Direct-To program. Then on January 24, 1989, the Commission found reason to believe that the Santini Committee and its treasurer violated 11 C.F.R. § 110.6(c)(3) for failing to report the NRSC as a conduit and 2 U.S.C. § 434(b) for failing to report all contributions received through the NRSC. Additionally on January 24, 1989, the Commission found reason to believe that the Santini Committee and its treasurer violated 2 U.S.C. § 434(b) for failing to report solicitation costs from the NRSC Direct-To program as contributions from the NRSC.

## II. ANALYSIS

### A. Direction or Control

The first issue in this matter is whether the NRSC exercised direction or control over the contributions transmitted to the Santini Committee through the five Direct-To operations. Pursuant to 2 U.S.C. § 441a(h), the Republican and Democratic Senatorial Campaign Committees, or the national committee of a political party, or any combination of such committees, may not contribute in excess of \$17,500 to a candidate for nomination for election, or for election, to the U.S. Senate during the year in which an election is held. Under the Act, the term "contribution" refers to any "gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."

2 U.S.C. § 431(8). Section 441a(f) of the Act provides that no candidate or political committee shall knowingly accept any contribution in violation of the contribution limits of the Act.

The Act further provides that the national and state committees of political parties may make coordinated party expenditures in connection with the general election campaigns of the parties' candidates. 2 U.S.C. § 441a(d). The Act limits these coordinated party expenditures to the greater of two cents multiplied by the voting age population of the state or \$20,000. 2 U.S.C. § 441a(d)(3)(A). Because the NRSC is not considered a national or state committee of a political party for purposes of making coordinated party expenditures, it is not authorized by 2 U.S.C. § 441a(d) to make these expenditures on behalf of Senatorial candidates. The national and state party committees, however, may authorize the NRSC to expend their respective coordinated party expenditure allowance on their behalf. See FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981).

The 1986 coordinated expenditure limit for Nevada was \$43,620. The NRSC was assigned 100% of the Republican National Committee's and the Nevada Republican state party committee's coordinated party expenditure limit, pursuant to 2 U.S.C. § 441a(d). Accordingly, the NRSC as the agent of the Republican National Committee and the state party committees, had a coordinated party expenditure limit of \$87,240, in addition to its own contribution limit of \$17,500.

The NRSC acted as a conduit for the contributions collected

under the "Direct-To" program. The Act and the Commission's rules deal specifically with contributions collected by a conduit or intermediary that are "earmarked" or otherwise directed to a particular candidate. 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.6. The term "earmarked" is defined in 11 C.F.R. § 110.6(b) as "a designation, instruction, or encumbrance (including those which are direct or indirect, express or implied, oral or written) which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." A "clearly identified" candidate means that either the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by unambiguous reference. 11 C.F.R. § 100.17. In a footnote in Buckley v. Valeo, 242 U.S.C. 1, 43, n. 51 (1976), the Supreme Court indicated that a reference to a candidate's status as a candidate, such as to "the senatorial candidate of the Republican Party of Georgia" may be sufficient to clearly identify a candidate. See also Advisory Opinion 1982-23, 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 3734 (The Commission has allowed a contribution to be earmarked for an undetermined Federal candidate where the facts indicated that the candidate was identifiable as to specific office, party affiliation, and election cycle.)

Thus, all contributions that are earmarked or otherwise directed to a candidate through a conduit or intermediary are contributions to the candidate from the original contributor.

2 U.S.C. § 441a(a)(8) and 11 C.F.R. § 110.6(a). In addition, the legislative history for this provision says that:

It is the understanding of the [House Administration] committee that the following rule will apply with respect to the application of the contributions limitations established by [current section 441a]: if a person exercises any direct or indirect control over the making of a contribution, then such contribution shall count toward the limitation imposed with respect to such person under subsection [441a], but it will not count toward such a person's contribution limitation when it is demonstrated that such person exercised no direct or indirect control over the making of the contribution involved (emphasis added).

H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. 16 (1974), reprinted in FEC Legislative History of Federal Election Campaign Act Amendments of 1974 at 649-50 (1977). See also, H.R. Rep. No. 93-1438, 93rd Cong., 2d Sess. 51, 52 (1974), reprinted in FEC Legislative History of the Federal Election Campaign Act of 1971 at 1020 (1977). In 1977 the Commission enacted a regulation which provided that in the case where a conduit exercises direction or control over the choice of the recipient candidate, the earmarked contribution will be treated as a contribution from both the original contributor and the conduit. See Explanation and Justification for 11 C.F.R. § 110.6, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 70 (1977). This codified the legislative intent that political committees may not use intermediary or conduit status as a vehicle for widescale circumvention of the contribution limitations.

Pursuant to 11 C.F.R. § 110.6(d)(1), "earmarked" contributions do not apply against the conduit's or

intermediary's contribution limitations, unless the conduit or intermediary "exercises any direction or control over the choice of the recipient candidate." The Commission's regulation makes it clear that if the conduit or intermediary does exercise any direction or control, "the earmarked contribution shall be considered a contribution by both the original contributor and the conduit or intermediary," and that the conduit's or intermediary's reports to the Commission "shall indicate that the earmarked contribution is made by both the original contributor and the conduit or intermediary, and that the entire amount of the contribution is attributed to each." 11 C.F.R.

§ 110.6(d)(2). In addition, Commission regulations require a conduit or intermediary to transmit an earmarked contribution to the intended recipient within 10 days of the conduit's or intermediary's receipt of the contribution. 11 C.F.R.

§§ 102.8(a) and (c).

Accordingly, in order for the funds collected and distributed by the NRSC through its "Direct-To" solicitation program not to be treated as contributions by the NRSC to the Santini Committee, the contributions solicited had to be properly earmarked within the meaning of 11 C.F.R. § 110.6(b), and, the NRSC could not have exercised "any direction or control over the choice of the recipient candidate." 11 C.F.R. § 110.6(d). The language of 11 C.F.R. § 110.6(d)(1) contemplates that even where a contributor exercises a choice, the conduit or intermediary may be found to have exercised direction or control.

Neither the legislative history nor Commission regulations



provide specific guidance as to the criteria required for a conduit or intermediary to be considered to have exercised "direction or control" over the choice of the recipient candidate of an earmarked contribution. See Explanation and Justification for 11 C.F.R. § 110.6(d), 54 Fed. Reg. 34098 (1989). Since there is no statutory or regulatory language that clearly delineates situations where direction or control exists from those in which the conduit does not exercise direction or control, the issue of "direction or control" has been evaluated on a case-by-case basis. See Explanation and Justification for 11 C.F.R. § 110.6(d), 54 Fed. Reg. 34098 (1989).

Several advisory opinions and enforcement matters provide guidance on the Commission's standard for determining whether a conduit exercised direction or control over the choice of the recipient candidate of a contribution. In Advisory Opinion 1980-46, the National Conservative Political Action Committee ("NCPAC") proposed a mass mailing project to solicit earmarked contributions for forwarding to the candidate's committee. 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5508. The proposed solicitation suggested that the contribution be in the form of a check payable to the candidate's committee, not to NCPAC. In determining that the proposed solicitation would not result in contributions by NCPAC, the Commission based its decision on the evidence that led to the conclusion that the individual contributor, not the conduit committee, makes the choice as to whether to make a contribution to the specified candidate. The Commission listed several factors upon which it based its

decision that NCPAC would not exercise direction or control over the earmarked contributions: First, the fact that a potential contributor may decide not to contribute indicates a lack of "control" over the choice of the recipient candidate by NCPAC since the contributions would be earmarked at the time they were made. Next, because the contributions were in the form of personal checks payable to the candidate committees, the committee has no control over the amount of the contribution or the intended recipient. Finally, pursuant to 11 C.F.R. § 102.8(c), the contributions must be forwarded within 10 days of receipt by the conduit committee so the committee has no significant control over the timing of the earmarked contributions.

The solicitation at issue in MUR 1028 was analogous to that proposed in Advisory Opinion 1980-46, and in fact, the final decision in MUR 1028 was based, in part, on the decision in Advisory Opinion 1980-46. MUR 1028 involved solicitation mailings sent out by the Council for a Livable World to its members ("Council"). Each solicitation letter sent out by the Council profiled two candidates and suggested that unless they had a preference, members with last names beginning with the letters from A to G should consider making contributions to one candidate, members with last names beginning from H to Q should consider making contributions to the other candidate, and contributors with last names beginning with letters R to Z should consider making a contribution to the Council itself.

As in Advisory Opinion 1980-46, the Commission based its

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decision on the evidence that the individual contributor, not the Council, made the decision as to whether an earmarked contribution to a specified candidate was made. First, the contributions were in the form of contributor checks made out to the candidate committee. Therefore, the conduit could not change the recipient or amount of the contribution. Even if it was clear that a contribution made out to the Council was intended for a candidate, the check was sent back to the contributor and was not forwarded to the candidate. None of the contributions were deposited into a Council account. In addition, no amount was suggested by the conduit, so the decision as to the amount of the contribution was decided by the contributor. Also, the conduit had no control over the timing of a contribution because it was up to the contributor to decide when to send in an earmarked contribution. The Council's practice was to forward earmarked contributions to the recipient candidates on a daily basis so the checks were in their hands no more than 24 hours.

Although the Council did select the candidates to be included in its solicitation mailings, and did suggest that contributions be made, it was considered important that the checks transmitted by the Council to the recipient candidates were made payable directly to the candidate committee. Thus, the Council did not have any more influence over the earmarked contribution than it would have if its mailings had recommended that its members send their contributions directly to the candidates.

In Advisory Opinion 1975-10, the Commission considered

whether a political committee with residual funds, the Circle Club, may obtain the consent of the contributors of said funds to earmark those funds for a specific federal candidate. 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5116. Thus, the contributions were already in the Circle Club's own account when it contacted the contributors and asked them to designate their contributions to a specific Federal candidate. The Commission decided that since "the committee will be asserting some control over the earmarking by reason of the fact that it will actively seek to obtain consent from the donors to earmark funds for a specific Federal candidate, it follows that the committee, as well as the original donor, should be regarded as having made the contribution." Thus, the Circle Club would control the earmarked contributions by virtue of the fact that it was controlling the choice of the recipient candidate and the timing of the contribution, as well as having the funds in its own account.

In Advisory Opinion 1981-57, the Commission considered whether contributions made through a payroll deduction plan may be earmarked for specific candidates without affecting the conduit's contribution limit. 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5636. The Coal Miners Political Action Committee ("COMPAC"), is the separate segregated fund of the United Mine Workers of America ("UMWA"). COMPAC proposed to allow UMWA members to authorize their employers to deduct from their paychecks a specified amount to be transferred to COMPAC as earmarked contributions to a named candidate or PAC. The Commission accepted COMPAC's representation that COMPAC would not

exercise direction or control over the donors' selection of recipients of earmarked contributions because of the circumstances surrounding the proposed earmarked contributions.

COMPAC's proposal called for the contributor, not COMPAC, to make the decision as to whether a candidate should receive an earmarked contribution. UMWA members who contribute to COMPAC were to be advised that they may earmark their contributions to any candidate or political committee, but there was no evidence in the proposal that separate communications would be made to UMWA members urging them to earmark their contributions for particular candidates. Moreover, in obtaining payroll deduction agreements from potential contributors, COMPAC would not limit the contributors to a particular candidate or group of candidates. In a footnote to Advisory Opinion 1981-57, the Commission expressly reserved the question of whether, if separate communications were made to UMWA members to earmark for particular candidates, COMPAC would be exercising direction or control over such contributions. Finally, the individual determined the timing of the earmarked contribution because the individual contributor could make arrangements for earmarking at the time of the initial check-off authorization or at any subsequent time. And the contributor would also retain the right to revoke the authorization at any time.

In Advisory Opinion 1986-4, Armstrong World Industries ("Armstrong"), a corporation, proposed a solicitation program run

by volunteer corporate employees.<sup>1</sup> 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5846. The proposal called for the volunteers to solicit a "pledge" from corporate executives to make a specific amount of political contributions. The proposal said that the volunteers would have corporate executives complete a form indicating their degree of interest in participating in making political contributions, the contribution categories they want to know more about, and the amount of their contribution pledge. An Armstrong employee would then serve as administrator of the solicitation program to match up potential contributors with contribution opportunities. In concluding that Armstrong would exercise direction or control over the proposed earmarked contributions, the Commission used a "totality of the circumstances" approach. The Commission concluded that Armstrong determined whether a candidate should receive an earmarked contribution, the aggregate amount of any contributions, and the timing of such contributions. Therefore, Armstrong, not the contributor, made the decision as to whether a candidate would receive an earmarked contribution.<sup>2</sup>

More recently, the courts provide guidance in the area of

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1. The thrust of this advisory opinion is related to corporate political activity. However, the Commission did also address the direction or control issue.

2. See also Response to Advisory Opinion Request 1976-92, 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 6951. This involved a fundraising scheme proposed by the Boeing Company, which the Commission said was "materially indistinguishable" from that presented in Advisory Opinion 1986-4. The Commission stated that any earmarked contributions would also be considered to be a contribution from the conduit, as well as the individual contributor, because of the method of solicitation.

"direction or control." In FEC v. NRSC, 761 F. Supp. 813 (D.C. 1991), a Federal district court upheld the Commission's decision that the NRSC exercised direction or control over contributions transmitted through one version of the Direct-To Auto operation.<sup>3</sup> See pp. 19-22, infra. That solicitation involved letters sent out on the letterhead of then Vice President George Bush, and mentioned four states where Republican Senate candidates needed funds. The solicitation stated that the contributions would be split equally among four campaigns. Potential contributors were asked to make their checks payable to the NRSC, the Republican Presidential Task Force of the Republican Inner Circle, but to direct their contributions for equal division among four candidates in the four states mentioned in the solicitation letter.

In concluding that the NRSC exercised direction or control, the court held that "it is clear from the face of the solicitation package that the fundraisers hoped to raise funds for candidate for whom donors might have little specific enthusiasm by blurring the specific funding requests in a general pro-party message." Specifically, the court confirmed the Commission's decision that the NRSC exercised direction or control because: the NRSC devised the solicitation; matched subgroups of the twelve candidates with groups of donors; presented donors with a pre-selected division of contributions

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3. On June 4, 1991, the NRSC filed a notice of appeal in FEC v. NRSC. That matter is pending before the Court of Appeals for the District of Columbia.

among pre-selected candidates; did not identify the candidates by name; requested checks payable to NRSC and associated entities and not to the individual campaign committees; failed to inform donors, as required by law, that the individual campaign committees had authorized and helped pay for the mailings; and merged and confused the general needs of the Republican Party with the needs of the individual Senate candidates. In addition, the court's decisions was further based on the fact that the NRSC solicitation provided no suggestion that the recipient could contribute other than according to the formula provided by the NRSC.

As explained above, pursuant to 11 C.F.R. § 110.6(d)(2), if a conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution both by the original contributor and the conduit or intermediary. The Santini Committee reported contributions received through the NRSC's "Direct-To" program as contributions from the original contributors. However, if the NRSC exercised direction or control over the choice of the recipient candidate, the Santini Committee was required, pursuant to 2 U.S.C. § 434(b) and 11 C.F.R. § 110.6(d)(2) to report those contributions to the Commission as contributions from the NRSC, as well as contributions from the individual contributors. Accordingly, if the NRSC exercised direction or control over the contributions transmitted through its "Direct-To" program, the Santini Committee violated 2 U.S.C. § 441a(f) by receiving excessive



contributions from the NRSC, and violated 2 U.S.C. § 434(b) and 11 C.F.R. § 110.6(d)(2) by failing to properly report contributions received through the Direct-To program as contributions from the NRSC.

1. Direct-To

The Santini Committee received \$71,627.33 from the NRSC Direct-To operation. The Direct-To operation is one of the five operations comprising the NRSC's conduiting program by the same name.<sup>4</sup> The Direct-To operation was conducted by the NRSC between November 1985 and November 1986. Certain selected contributions to the NRSC were held in a special segregated NRSC account. An NRSC representative would then call the contributor and suggest that the contributor designate some or all of his contributions to a federal candidate named by the NRSC representative. Jim Santini was one of the candidates mentioned by the NRSC.

The NRSC telephone script for the Direct-To calls instructed the NRSC representative to tell the contributor that certain candidates are in particular need of help, and to designate the top priority, the second priority and the third priority. The NRSC caller suggested a minimum of three candidates to the contributor. No record was kept of how many times specific candidates were mentioned by NRSC callers.

The contributor could direct his contribution to one, all, or none of the candidates suggested by the NRSC caller. The

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4. In order to avoid confusion, henceforth, all of the five operations comprising the NRSC Direct-To program will be referred to as the "NRSC conduiting program."

contributor could also direct his contribution to a candidate not identified by the NRSC caller. However, the script does not include any specific language to inform the contributor that he was not required to earmark his contribution. Nor does it include any language to inform the contributor that he could choose to earmark a contribution to a candidate other than those mentioned by the NRSC representative. Cf. Advisory Opinion 1981-57. A comment under the heading "secondary phrases" on the telephone script includes language that says: "For your contribution to be forwarded to a specific candidate Federal Election Law requires that the choice be yours." However, another comment under that heading includes language that says: "The president has asked the Task Force to help these three candidates at this time."

If a contributor chose to designate some or all of his contribution to specific candidates, the NRSC sent a candidate support verification form to the contributor which identified the candidate(s) to receive his contribution, and asked the contributor to sign and return it to the NRSC. The candidate support verification forms had the contributor's signature above a paragraph which said: "This is to verify my telephone instruction of [date], that my [amount] contribution is being utilized in direct support of Jim Santini of Nevada [amount of contribution again], and will be forwarded to that campaign on my behalf." Any contribution not designated by the contributor was returned to the NRSC account. No contribution was held in the separate segregated account for more than 10 days. All of the

\$71,627.33 the Santini Committee received from the NRSC Direct-To operation was in the form of NRSC checks.

It is apparent that the Direct-To contributions were earmarked because the contributors orally designated their contributions to specific candidates over the phone. Additionally, in many instances, the contributors filled out verification forms stating that they had earmarked their contribution.

The next issue is whether the NRSC exercised direction or control over the earmarked contributions transmitted to the Santini Committee through the Direct-To operation. Commission matters dealing with the direction or control issue seem to have been decided primarily on whether the conduit or the contributor makes the decision that a particular candidate should receive a contribution, and how much influence the conduit exercises. See e.g., FEC v. NRSC, 761 F. Supp. 813 (D.C. 1991). In the Direct-To operation, the NRSC made the important decisions concerning the earmarked contributions. First, the NRSC decided the timing of the contributions. The Direct-To operation was conducted over a year-long period. At any time during that period, the NRSC could decide that it wanted a particular candidate to receive earmarked contributions. The NRSC could then set aside incoming contributions to the special segregated Direct-To operation account and have a representative call the contributor and ask them to designate their contribution for a candidate.

For example, Santini announced his candidacy on March 24,

1986 and received earmarked contributions from the NRSC only seven days later on March 31, 1986. On March 25, 1986, and for every day through March 31, 1986, the NRSC contacted contributors who had previously made contributions in response to NRSC-originated fundraising appeals, and asked them to earmark all or portions of their contributions to the Santini Committee. Thus, the NRSC was able to get contributions to Santini in the early part of his campaign. In addition, the Direct-To contributions were transmitted to the Santini Committee in the form of NRSC checks. Although that in itself does not mean the NRSC has exercised direction or control, that taken with the other factors, points to the conclusion that there is direction or control.<sup>5</sup>

The Direct-To operation is distinguishable from the conduiting programs in MUR 1028 and Advisory Opinion 1980-46. In MUR 1028 and Advisory Opinion 1980-46, the contributors made the decision to earmark their contributions before their contributions were made. Thus the contributors had an active role in deciding to make an earmarked contribution. Here, the contributors' role is much more passive. In the Direct-To operation, the contributors had earlier made contributions which

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5. During the 1989 rulemaking for amending 11 C.F.R. § 110.6, the Commission declined to set standards for direction or control and instead decided to retain the "case by case" approach. See e.g., Advisory Opinion 1986-4. Additionally, in Advisory Opinion 1980-46 and MUR 1028, the Commission took into account the fact that the earmarked contributions were transferred in the form of contributor checks rather than conduit checks in determining that the conduit did not exercise direction or control.

were already in an NRSC account before the contributors had an opportunity to decide whether to earmark their contributions. The checks were already in an NRSC account and all the contributors did was consent to how the NRSC wanted to spend their contributions. The contributors did not make the decision to contribute to a particular candidate, they merely consented to the NRSC's suggestion that they do so.

The solicitation method used by the NRSC to solicit earmarked contributions through the Direct-To operation is much the same as that used by the conduit in Advisory Opinion 1975-10. As noted above, in Advisory Opinion 1975-10, the Commission decided that the conduit would assert control over the earmarking of the contributions by actively seeking to obtain consent from the contributors to earmark their previously-made contributions for a specific candidate; therefore, the conduit should be regarded as having made the contribution along with the original contributor.

Accordingly, there is probable cause to believe that the Santini Committee received \$71,627.33 in contributions transmitted through the Direct-To operation over which the NRSC exercised direction or control.

2. Direct-To Auto

a. September 2, 1986 mailing

The Direct-To Auto is another one of the five operations of the NRSC conduiting program. This operation was implemented between September and November 1986 in two separate forms. The Santini Committee received contributions from both forms of the

Direct-To Auto operation.

One version of the Direct-To Auto operation involved solicitation letters sent out on September 2, 1986 on the letterhead of then Vice President George Bush. See discussion of FEC v. NRSC, supra. As noted above, the letters mentioned four states where Republican Senate candidates needed funds and stated that contributions submitted by the contributor would be split equally among the four campaigns. Nevada was one of the states mentioned in the letters. There were twenty-four variations of the solicitation letter in this first version of the Direct-To Auto operation. The state of Nevada appeared as one of the four states in need of funds in twelve versions of the letter.

The Santini Committee received \$346,304 from the NRSC through the first version of the Direct-To Auto operation, all in the form of NRSC checks.<sup>6</sup> Although neither Santini's name nor picture appears in the solicitations sent out through this version of the Direct-To Auto operation, a contribution may be earmarked for an undetermined Federal candidate where the facts indicated that the candidate was identifiable as to a specific office, party affiliation, and election cycle. See Buckley v. Valeo, 242 U.S. 1, 43, n. 51 (1976); see also, Advisory Opinion

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6. The Santini Committee also received \$24,887 from the NRSC. These funds were raised by the NRSC through the Direct-To Auto program, but were specifically earmarked for the NRSC, not the Santini Committee. The NRSC admitted to a violation of 2 U.S.C. § 434(b) for reporting these contributions earmarked for itself, as contributions earmarked for candidates such as Santini. The Santini Committee's receipt of the \$24,887 is not included as a violation against the Santini Committee because these funds were not designated according to the Direct-To Agreement between the Santini Committee and the NRSC.

1982-23, 1 Fed. Election Camp. Fin. Guide [CCH] ¶ 5662 (the Commission permitted a committee to earmark a contribution to an as yet unselected Republican candidate from the 24th Congressional District of New York).

It is apparent that the \$346,304 was earmarked because the language of both the letter and the reply clearly stated to the contributor how his contribution would be divided. To illustrate, the solicitation letters clearly state that contributions are needed for Jim Santini and the Nevada Senate election. In addition, the reply card says that the contribution is enclosed "to make sure the Santini campaign has the funds it needs" to win. Thus, Santini is clearly identified as the recipient of the contribution and the contributions were earmarked by the contributors.

As noted above, a Federal District Court judge has determined that the NRSC exercised direction or control over the contributions transmitted through the Direct-To Auto operation to the recipient candidates. FEC v. NRSC, 761 F. Supp. 813 (D.C. 1991). On April 9, 1991, the court in FEC V. NRSC, granted the Commission's motion for summary judgment and held that the NRSC exercised "direction or control over the choice of the recipient candidate" within the meaning of 11 C.F.R. § 110.6(d). Accordingly, there is probable cause to believe that the Santini Committee received \$346,304 in contributions transmitted through the first version of the Direct-To Auto operation over which the NRSC exercised direction or control.

b. August 13, 1986 mailing

The second version of the Direct-To Auto operation involved solicitation letters sent out by the NRSC which mentioned only one Senate race per letter. The Santini Campaign was one of the races targeted in this version of the Direct-To Auto program. The solicitation letters sent out on behalf of Santini were dated August 13, 1986, from Tom Griscom, Executive Director of the NRSC, and stated that Santini's winning the Nevada Senate seat "is essential to our overall plan of retaining a Republican Majority in the U.S. Senate." The letters requested an "immediate, emergency contribution. . .to help us win this all-important Senate seat." Different versions of the letters suggested various contribution amounts. Some of the letters suggested that the contributor make a contribution of \$50 or even \$75, while others suggested a contribution of \$100 or \$150. It is not clear what the criteria was for determining which letter potential contributors received.

Also included in the solicitation were copies of a "confidential" memo to Griscom from Scott Covington, the NRSC's political director, concerning the cash shortfall in Nevada. The focus is on the importance of holding on to Republican control of the open Senate seat in Nevada, rather than on Santini personally. The reply form enclosed in the solicitation is addressed to Griscom and says:

"I've read your letter and Scott's Confidential Memorandum. And I understand that we must win Nevada to hang on to our Senate Majority this year.



To make sure the Santini campaign has the funds it needs to defeat liberal Democrat Harry Reid, I'm enclosing the most generous contribution I can today for:" [amounts suggested in the body of the letter, and a category of "other" was listed on the reply form].

A notation on the bottom of the reply form informed the contributor to make checks payable to the NRSC.

The Santini Committee received \$72,055 from this version of the NRSC Direct-To Auto program, all in the form of NRSC checks.

The solicitation letters clearly state that contributions are needed for Jim Santini and the Nevada Senate election. The reply card says that the contribution is enclosed "to make sure the Santini campaign has the funds it needs" to win. Thus, Santini is clearly identified as the recipient of the contribution and the contributions were earmarked by the contributors.

The next issue is whether the NRSC exercised direction or control over the contributions it transferred to the Santini Committee from this second version of the Direct-To Auto program. Here, the NRSC's involvement in the solicitation of earmarked contributions went beyond mere requests for assistance for certain campaigns or other general fundraising. The NRSC matched-up particular contributors with particular candidates and included a suggested amount which varied depending on the contributor. See Advisory Opinion 1986-4. The NRSC determined which candidates would be a part of this version of the Direct-To Auto operations, and also decided how many letters would mention each candidate. A total of 106,981 of the 418,523 letters sent

out through this version of the Direct-To Auto operation, requested an earmarked contribution for the Santini Committee. Thus, about 25 percent of the solicitations sent out through this version of the Direct-To Auto operation were on behalf of the Santini Committee. Also, the contributors were asked to make their checks payable to the NRSC. The NRSC then disbursed the earmarked contributions to the Santini Committee from its own account.

The Direct-To Auto solicitation letters did not indicate that the contributor had any other option but to send their contribution to the NRSC as an earmarked contribution to Santini or not to contribute at all. The NRSC's Direct-To Auto program thus confined the solicitees' option to making an earmarked contribution on behalf of a specified candidate only. This can be distinguished from MUR 1028 where the solicitees were given the option of making an unearmarked contribution to the conduit, and Advisory Opinion 1981-57 where the solicitees were advised that they may earmark their contribution to any candidate or political committee.

Also, in both Advisory Opinion 1980-46 and MUR 1028, the earmarked contributions were in the form of contributor checks. The fact that the Direct-To Auto solicitees were directed to use the NRSC as the only means for delivery of a contribution to Santini gave the NRSC complete control over the dissemination of the funds to the candidates and is significant to further distinguish this operation from Advisory Opinion 1980-46 and MUR 1028. In addition, in MUR 1028, no amounts were suggested.

Here, the NRSC suggested a contribution amount and that amount varied depending on the recipient of the letter.

Thus, a look at all of the factors involved in the Direct-To Auto solicitation suggests that the NRSC was not acting as merely a passive conduit. Instead, it played an active role in assisting the contributors to choose Santini as a recipient candidate for their earmarked contributions. The NRSC decided which races needed money and which ones were important to maintain a Republican Majority in the Senate. After selecting the candidates whom it intended to help, it confined the contributors choice of recipients to those particular candidates; it suggested the amount to be contributed; it arranged for the contribution to be made payable to the NRSC; and it then forwarded the contribution to the recipients from its own account. Thus, the NRSC exercised direction or control over the contributions transferred to the Santini Committee through this version of the 'Direct-To Auto program.

Accordingly, there is probable cause to believe that the Santini Committee received \$72,055 in contributions transmitted through the second version of the Direct-To Auto operation over which the NRSC exercised direction or control.

### 3. Majority '86

The third operation of the NRSC conduiting program that the Santini Committee received contributions from is the Majority '86 operation. The Majority '86 operation of the NRSC conduiting program was conducted from November 1985 through November 1986. This operation involved NRSC solicitations to individuals and

political committees requesting a pledge of \$5,000 or more, with \$4,000 earmarked to particular Senate candidates and \$1,000 designated for the NRSC operating account. Money for this operation was also raised from the NRSC's Inner Circle contributors.<sup>7</sup> One of the ways the NRSC obtained contributions through this program was by depositing contributions to the NRSC's "Inner Circle" in the Majority '86 account. NRSC telephone callers then contacted the contributor for instructions on earmarking the contribution to particular Senate candidates. According to Dana M. Beaumont, Campaign Finance Assistant to the NRSC, Majority '86 callers did not follow any particular script when they called contributors to ask them to earmark their contribution to specific candidate(s). The Inner Circle checks placed in the Majority '86 account were not held for more than 10 days.

Contributions to the Majority '86 operation were also solicited through letters to Inner Circle members. A sample solicitation letter submitted by the NRSC was sent to an Inner Circle member and invited him to join Majority '86. Those making a \$1,000 contribution to renew their Inner Circle membership, however, could also join Majority '86 by applying their \$1,000 Inner Circle contribution toward Majority '86 membership and contributing \$1,000 to each of four candidates through the NRSC.

The sample solicitation letter states that: "The candidate you support is up to you. However, on your Briefing Registration

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7. Individuals who contributed \$1,000 to the NRSC were considered "Inner Circle" contributors.

Reply, I've listed three of our candidates who are in serious need of your help right now if they are to have a chance of winning in November." The Briefing Registration Reply lists the three candidates with a box beside each name so that the contributor can check off which candidate will receive his first \$1,000 payment.

The NRSC sent out 16 different mailings through the Majority '86 operation. Ten of the mailings were general solicitations, seeking contributions to the NRSC for its operations. Six mailings were candidate specific and mentioned particular candidates involved in close races.

The Santini Committee received a total of \$75,575 from the Majority '86 program from 90 contributors -- \$43,000 in the form of contributor checks and \$32,575 in the form of NRSC checks. Available NRSC records do not indicate which solicitations resulted in contributions to the Santini Committee in the form of contributor checks and which solicitations resulted in contributions through NRSC checks. The Santini Committee's share amounts to 6% of the total \$1,201,419 in contributions designated for specific candidates through the Majority '86 operation.

The contributions transmitted through the Majority '86 operation were earmarked. A total of \$43,000 transmitted to the Santini Committee was in the form of contributor checks made payable directly to the Santini Committee; those contributions were clearly earmarked. As for the \$32,575 transmitted in the form of NRSC checks, there are no NRSC records to identify exactly how each of these contributions were solicited. Many of

the Majority '86 solicitations included telephone and personal contacts with Majority '86 members and prospects, for which no records are available. Some Majority '86 donors contributed \$5,000 checks made out to the NRSC with designations of recipient candidates rather than separate \$1,000 checks to be passed on. Although it is not clear exactly how each contribution making up the \$32,575 was solicited, it is apparent from the various solicitation methods used by the NRSC that the contributors made at least an oral designation of their contributions to Santini. Thus, the contributions transmitted in the form of NRSC checks were also earmarked.

The NRSC set up the Majority '86 operation with the Santini Committee and other Senate candidates to obtain earmarked contributions to Santini and the others targeted through this operation. According to the NRSC, there are no records of the number and total cost of solicitations for this operation "because these solicitations may have included telephone and personal contacts with Majority '86 members and prospects, for which records are not available." The fact that solicitations for the Majority '86 operation included telephone calls and personal contacts is sufficient to distinguish this matter from Advisory Opinion 1980-46 and MUR 1028. In those matters the solicitations were informal and impersonal, in the form of direct mail letters. But here, the solicitations included more personal contact with the contributors without any script. Thus, it cannot be determined what was said to the contributors. The solicitations in this operation are more closely akin to the

proposed solicitation in Advisory Opinion 1986-4 than to those at issue in Advisory Opinion 1980-46 and MUR 1028.

Because of the seeming amount of personal and telephone contacts involved in the Majority '86 operation, the NRSC's involvement in the solicitation of earmarked contributions went beyond mere requests for assistance for certain campaigns or other general fundraising. The NRSC decided which candidates to include in the literature sent out through the Majority '86 program, and decided how best to solicit each potential contributor. The lack of information on the solicitations indicates that the Majority '86 solicitations were quite personal in nature and not form-like as in Advisory Opinion 1980-46 and MUR 1028. In Advisory Opinion 1980-46 and MUR 1028, the recipients of the solicitation letters were provided with direct mail letters which suggested that they make an earmarked contribution. In the Majority '86 operation, rather than just providing the contributors with an opportunity to make an earmarked contribution, more of a direct effort was made by the NRSC through telephone calls and personal contacts in an attempt to persuade them to make earmarked contributions.

Almost half of the funds transmitted to the Santini Committee through the Majority '86 operation were in the form of NRSC checks. The NRSC clearly stated that the Majority '86 solicitations included telephone and personal contacts with Majority '86 members and prospects. Thus, many of the Majority '86 contributions were not earmarked until after the contributions were already in an NRSC account. Again, as noted

in the analysis of the Direct-To operation, the fact that \$32,575 in contributions from the Majority '86 operation were transmitted to the Santini Committee in the form of NRSC checks does not in and of itself mean that the NRSC exercised direction or control over these contributions. However, that along with other factors, such as telephone calls and personal contacts, indicates that in the totality of the circumstances, the NRSC exercised direction or control over the choice of the recipient candidate of the \$32,575 transmitted to the Santini Committee in the form of NRSC check. See footnote 7, *supra*. Therefore, there is probable cause to believe that the Santini Committee received \$32,575 in contributions transmitted through the Majority '86 operation in the form of NRSC checks, over which the NRSC exercised direction or control.

It is not as clear that the NRSC exercised direction or control over the remaining \$43,000 transferred to the Santini Committee in the form of contributor checks. The fact that these checks were made payable to the Santini Committee rather than the NRSC is indicative of a lack of NRSC "control" over the choice of the recipient. See Advisory Opinion 1980-46. Also, the NRSC did not have control over the timing of the contributions because they were earmarked at the time they were received by the NRSC. However, it is also not clear that the NRSC did not exercise direction or control over the \$43,000 transferred to the Santini Committee in the form of contributor checks. But because the evidence is not strong enough to establish that the NRSC did exercise direction or control over these contributions, and



because it appears that adequate records to establish direction or control do not exist, the \$43,000 transmitted to the Santini Committee in the form of contributor checks is not included in the probable cause recommendation.

4. Trust Program

The Santini Committee received a total of \$113,475 through the Trust Program operation. This operation involved solicitations by phone and at NRSC meetings of Trust members, who were individuals who had contributed \$10,000 to the NRSC. Then, as part of the Direct-To program, the NRSC made a concerted effort to get those individuals to earmark contributions to particular Senate candidates. These efforts were conducted by the NRSC from November 1985 through November 1986.

The Trust Program was run much more informally than the other Direct-To conduiting programs discussed above. The NRSC communications through the Trust Program were by telephone, personal reminder, or at one of the regularly scheduled Trust briefing meetings. Therefore, there is no record of what was said in the Trust program solicitations.

Most of the contributions received by the Santini Committee through the Trust Program were in the form of contributor checks (\$107,875). The contributions that were sent in the form of NRSC checks (\$5,600) were verified by the NRSC either through a letter to the contributor (including a contributor verification response) or an internal NRSC memorandum following a telephone conversation.

It appears that the \$5,600 in contributions transmitted to

the Santini Committee in the form of NRSC checks were already in the NRSC Trust account, while the remaining \$107,875 was from new contributions.

With respect to the \$5,600 transmitted to the Santini Committee by NRSC check, the indication is that the NRSC exercised some direction or control over the contributors' choice of the recipient candidates. As in the Majority '86 operation, this program involved telephone and personal contacts with Trust members to persuade them to earmark contributions to Republican Senate candidates. While most of the contributions transmitted to the Santini Committee through the Trust Program were in the form of contributor checks, indicating that the contributors had made the decision to earmark their contributions, the \$5,600 transmitted to Santini in the form of NRSC checks indicates that these contributions were already in the Trust account when the NRSC contacted the contributors to suggest that they earmark their contributions to specific candidates. For example, a copy of a letter to the Santini Committee from a Trust contributor whose contribution was earmarked to the Santini Committee says as follows:

When Frank Fahrenkopf was here recently he told me of the difficult fight you had on your hands to become the Republican senator from Nevada and suggested that \$1000 of my Senatorial Trust contribution be used to assist you.

The Senatorial Trust office concurs with this recommendation and accordingly you will receive \$1000 from them toward your campaign.

This letter indicates that the contributor had already made

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a contribution to the NRSC Trust, and his check was already in the Trust account when he was contacted by an NRSC representative who suggested that he earmark part of his Trust contribution to Santini. This is analogous to the situation in Advisory Opinion 1975-10. In addition, the fact that the contributor acknowledges that his earmarked contribution is being sent to Santini because the Senatorial Trust office "concurs" with his decision to earmark a contribution to Santini, indicates that the NRSC had a significant role in selecting Santini as the recipient of his earmarked contribution.

The fact that the \$5,600 was already in an NRSC account indicates that the NRSC had more control over the timing of the contribution. Cf. Advisory Opinion 1980-46 and MUR 1028. In the situations in Advisory Opinion 1980-46 and MUR 1028, where the checks were made payable to the recipient committees, the conduit had no choice but to forward the earmarked contributions within ten days. But in this situation, with the funds already in the NRSC's own account, the NRSC had more control over the timing of the earmarking and subsequent transmittal of contributions to recipient candidates such as Santini.

Accordingly, there is probable cause to believe that the Santini Committee received \$5,600 transmitted through the Trust Program, over which the NRSC exercised direction or control.

As in the Majority '86 operation, it is not as clear that the NRSC exercised direction or control over the contributions earmarked through the Trust Program in the form of contributor checks. For example, a copy of the "Memorandum Reply" which

appears to have accompanied solicitation letters contained a list of fourteen candidates for Trust Program members to choose from. Thus, the contributors were given more of a choice to decide which candidates would receive their earmarked contributions. This is similar to the solicitation in MUR 1028 where the contributors were given three choices.<sup>8</sup> Also as in MUR 1028, the NRSC did not have control over the timing of the \$107,875 in contributions made payable directly to Santini. Again, while the form of the check is not determinative of direction or control, it is another indicator that the contributors rather than the NRSC determined the recipient of the earmarked contribution.

However, it is not entirely clear that the NRSC did not exercise direction or control over all of the contributions transmitted to Santini through the Trust Program. The available NRSC records do not contain information about the scripts used for soliciting earmarked contributions through the Trust Program so it is not clear exactly what was said by the NRSC to persuade Trust members to earmark their contributions to specific candidates such as Santini. Where the NRSC provided copies of solicitation letters and phone scripts used for other operations of the Direct-To program, it was apparent that the NRSC had exercised direction or control; thus, it seems likely that the NRSC exercised direction or control over all of the contributions

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8. In addition, although it is not clear that Trust Program members were encouraged to do so, at least one of them designated one of their contributions to a candidate not on the list by writing the candidate's name on the "Memorandum Reply." See Advisory Opinion 1981-57.

earmarked through the Trust program. But, again, because the evidence is not strong enough to establish that the NRSC did not exercise direction or control over these contributions, and because it appears that adequate records to establish direction or control do not exist, the \$107,875 transmitted to the Santini Committee in the form of contributor checks is not included in the probable cause recommendation.

5. Miscellaneous Conduiting

The Santini Committee received a total of \$264,197.20 from the Miscellaneous Conduiting operation -- \$235,901.66 in the form of contributor checks and \$28,295.54 in the form of NRSC checks. The "Miscellaneous Conduiting" portion of the Direct-To program involved either direct NRSC solicitations for earmarked PAC and individual contributions for forwarding by the NRSC to particular candidates, or the receipt by the NRSC of unsolicited earmarked contributions. All of the contributions were received between July and November 1986. The Miscellaneous Conduiting operation did not involve any written solicitations for contributions specifically to the Miscellaneous Conduiting operation. According to the NRSC, there were no verification letters because all of the contributions were either made payable directly to a particular candidate, or accompanied by a letter of instruction directing the amount contributed to a particular candidate.

The NRSC has stated that some of the contributions raised through the Miscellaneous Conduiting operation were solicited, but there no specific written solicitations for the Miscellaneous Conduiting operation. The fact that \$28,295.54 was earmarked to

Santini in the form of NRSC checks suggests that the NRSC played an active role in getting the contributors to earmark their contributions to Santini either in the form of phone calls or some other personalized solicitations. The transmittal of these contributions in the form of NRSC checks also suggests that the NRSC had control over the timing of these contributions. See e.g., Advisory Opinion 1975-10; Cf. Advisory Opinion 1980-46. Accordingly, there is probable cause to believe that the Santini Committee received \$28,295.54 in earmarked contributions from the Miscellaneous Conduiting operation, over which the NRSC exercised direction or control.

A large percentage of the contributions transmitted to the Santini Committee through the Miscellaneous Conduiting operation were made payable directly to the candidate (\$235,901.66). As a result, the NRSC did not have control over the timing of these contributions. See Advisory Opinion 1980-46 (the fact that the contributions were in the form of checks payable directly to the candidate was indicative of a lack of conduit control over the timing of the earmarked contributions). Some of the earmarked contributions transmitted through the Miscellaneous Conduiting operation were not even solicited by the NRSC. Thus, it appears that some of these contributions were earmarked on the contributor's initiative. However, the extremely limited information regarding this program available to this Office does not provide enough evidence to conclude that the NRSC did not exercise direction or control over these contributions. Based on the role the NRSC played in the entire Direct-To program, it is

not clear that the NRSC did not exercise direction or control. But because the evidence neither proves nor disproves that the NRSC exercised direction or control over \$235,901.66 in contributions transmitted in the form of contributor checks to the Santini Committee through the Miscellaneous Conduiting operation, that amount is not included in the probable cause recommendation.

**6. Summary of Direction or Control**

The Santini Committee received a total of \$556,456.87 in contributions through the Direct-To conduiting program over which the NRSC exercised direction or control over the choice of Santini as the recipient candidate. Specifically, the NRSC exercised direction or control over \$71,627.33 in earmarked contributions transmitted through the Direct-To operation; \$346,304 in earmarked contributions transmitted through the first version of the Direct-To Auto operation; \$72,055 in earmarked contributions transmitted through the second version of the Direct-To Auto operation; \$32,575 in earmarked contributions transmitted to the Santini Committee by NRSC check through the Majority '86 operation; \$5,600 in earmarked contributions transmitted by NRSC check through the Trust operation; and \$28,295.54 in earmarked contributions transmitted by NRSC check through the Miscellaneous Conduiting operation. The Santini Committee and the NRSC entered into a formal Direct-To Agreement before any Direct-To contributions were transmitted to the Santini Committee. The agreement provided for a liaison between the NRSC and the Santini Committee with respect to the Direct-To

program, and the responses of Santini Committee personnel indicate that there was contact between the Santini campaign and the NRSC with respect to the receipt of conduited contributions.

In addition, all of the \$556,456.87 in contributions over which the NRSC exercised direction or control was given to the Santini Committee in the form of NRSC checks. It appears, therefore, that the Santini Committee was aware of the circumstances under which it received funds from the NRSC, including the fact that the funds would be sent to the Santini Committee from contributions previously sent to the NRSC without any designation to the Santini Committee. Therefore, there is probable cause to believe that Jim Santini for Senate and J. Glen Sanford, as treasurer, violated 2 U.S.C. § 434(b) and 11 C.F.R. § 110.6(d)(2) for failing to report \$556,456.87 in earmarked contributions as made by both the original contributors and the NRSC.

In addition, the Santini Committee's receipt of the \$556,456.87 in contributions over which the NRSC exercised direction or control resulted in the Santini Committee's receipt of excessive contributions from the NRSC. During the 1986 election, the NRSC made direct contributions totaling \$15,666 to the Santini Committee. As noted above, the RNC and the Nevada Republican state party committee had assigned their coordinated expenditure limits to the NRSC, which was a total of \$87,240. The NRSC spent all but \$249.06 of the coordinated expenditure limit.

The Santini Committee received \$556,456.87 from the NRSC



through the Direct-To program. After subtracting the NRSC's remaining 2 U.S.C. § 441a(h) limit or \$1,834 (\$17,500 - 15,666), and the NRSC's remaining coordinated expenditure limit of \$249.06, the Santini Committee received a total of \$554,373.81 in excessive contributions from the NRSC through the Direct-To program. Therefore, there is probable cause to believe that Jim Santini for Senate and J. Glen Sanford, as treasurer, violated 2 U.S.C. § 441a(f) by accepting excessive contributions in the amount of \$554,373.81.

**B. Solicitation Costs**

The second major question in this matter is whether any solicitation costs paid by the NRSC to solicit earmarked contributions for the five Direct-To operations were contributions by the NRSC to the Santini Committee, resulting in a violation of 2 U.S.C. § 434(b) for the Santini Committee's failure to report the solicitations costs as contributions from the NRSC, and thus adding to the amount of excessive contributions received by the Santini Committee from the NRSC in violation of 2 U.S.C. § 441a(f).

The NRSC's figure for the total solicitation costs attributable to the Santini Committee for the entire Direct-To conduiting program is \$24,188. The Santini Committee received a total of \$943,233.53 in earmarked contribution from more than 5,342 contributors through all five operations of the Direct-To program. The costs of soliciting and transmitting these contributions was allocated to the Santini Committee at a flat charge of three dollars per contribution, pursuant to the advice

provided to the NRSC by outside accounting firms. The only exception to this method of attributing solicitation costs was the first version of the Direct-To Auto operation where the recipient candidates were charged \$.33 per contribution forwarded by the NRSC to the recipient committees.

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The NRSC received opinions from two accounting firms of the value of the services provided to Senate candidates through the Direct-To program. Pursuant to their advice, the NRSC established a flat charge of three dollars per earmarked contribution forwarded by the NRSC to a candidate's campaign. This fee, which paid for the services of the telephone callers, the letters and verification forms mailed to contributors who directed a contribution to a candidate, and an allocated portion of the Committee's overhead and other costs, did not vary with the size of the contribution forwarded to Senate candidates, but was rather a flat fee of three dollars per each contributor-directed contribution. Bills for these expenses were presented to candidates on a monthly basis. The Santini Committee has paid all of their bills in full.

The issue here concerns solicitations for the Direct-To program for which the Santini Committee was not billed. The three dollar per contribution charge was only for the successful solicitations, i.e., those that were earmarked and forwarded to them. If the Santini Committee had undertaken a comparable solicitation effort, it would have paid for all of the solicitation costs -- both successful and unsuccessful. Thus, the aggregate solicitation costs for both successful and

unsuccessful earmarked contributions must be considered in determining whether the NRSC paid for some of the solicitation costs on behalf of the Santini Committee, thus resulting in in-kind contributions or coordinated expenditures on behalf of the Santini Committee.

Section 431(8)(A) of Title 2 and 11 C.F.R. § 100.7(a)(1) define "contribution" to mean "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." Section 100.7(a)(1)(iii)(A) of the Commission Regulations defines "anything of value" as including all in-kind contributions, and states that "the provision of any goods or services without charge . . . is a contribution."

According to 11 C.F.R. § 106.1(a), "expenditures . . . made on behalf of more than one candidate shall be attributed to each candidate in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived." Section 106.1(b) states that an authorized expenditure (other than a section 441a(d) expenditure) made by a political committee on behalf of a candidate shall be reported as a contribution in-kind to the candidate on whose behalf the expenditure was made. Section 106.1(c)(1) provides that expenditures for fundraising need not be attributed to individual candidates "unless these expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate." Section 106.1(d) defines "clearly identified" to mean either that the candidate's name appears, a photograph or drawing of the

candidate appears, or "the identify of the candidate is apparent by unambiguous reference." See discussion of "clearly identified" at p. 4, supra.

Based on the above-stated sections, it appears that, in order to determine whether the cost for all of the solicitations should be considered as an in-kind contribution of the NRSC to the Santini Committee, it is necessary to establish that the costs were incurred for the purpose of influencing a federal election, that the Santini Committee derived a benefit, and that the expenditures resulting in that benefit can be directly attributed to Santini as a clearly identified candidate.

1. Direct-To

The total cost of general solicitations for the Direct-To operation, as determined by available NRSC records, was \$1,951,093. This includes the cost of services of vendors, e.g., printing and mailing costs. The NRSC asserts that this is not the cost for solicitations for the Direct-To operation but represents the cost of the NRSC's own general solicitations which occurred prior to any Direct-To solicitations.

The NRSC received approximately \$6,947,872 from 145,948 contributors in response to these general solicitations. After the NRSC received these contributions, it deposited approximately 16,000 contributions in the Direct-To account. An NRSC representative then called the contributors and suggested that the contributors earmark their contributions to one of the candidates named by the NRSC caller. These calls resulted in a redesignation of \$1,082,160. The Santini Committee received

2,466 contributions totaling \$71,627. The NRSC charged the Santini Committee three dollars per contribution for a total of \$7,398 in solicitation costs for the contributions earmarked through the Direct-To operation.

Clearly, the benefit of the Direct-To operation did not begin at the moment a contribution was designated for the Santini Committee, but some time before then. The Santini Committee clearly derived a benefit from the original solicitation letters sent out by the NRSC and from the phone designation program. Had the Santini Committee undertaken such a fundraising effort on its own, it would have had to pay the costs for the unsuccessful solicitations as well as the successful solicitations. Therefore, the solicitation costs for both the successful and unsuccessful solicitations should have been paid for by the Santini Committee.

As noted above, the NRSC spent \$1,951,093 to solicit contributions for the Direct-To operation. Of the amount of contributions received from that general fundraising, a total of \$6,947,872 was raised. Thus, the total solicitation cost was approximately 28% of the total amount raised. Of that amount, \$1,082,160 was redesignated for specific candidates. Using these figures, the approximate amount of solicitation costs for all of the redesignated contributions can be determined by comparing the ratio of the total amount of the Direct-To solicitation costs (\$1,951,093) over the total amount of contributions raised (\$6,947,872), with the ratio of the solicitation costs for all of the redesignated contributions over the total amount of

contributions redesignated (\$1,082,160). Thus, the solicitation costs for the redesignated contributions was approximately \$303,891. Using a similar ratio comparing the solicitation costs for the redesignated contributions (\$303,891) over the total amount of redesignated contributions (\$1,082,160), with the Santini Committee's solicitations costs over the amount of contributions redesignated for Santini (\$71,627), it can be determined that the Santini Committee's share of solicitation costs should be approximately 28% of the total amount of contributions redesignated for Santini. Thus, the Santini Committee's share of solicitation costs for the Direct-To operation was approximately \$20,114.<sup>9</sup> As noted above the NRSC billed the Santini Committee only \$7,398 for solicitation costs associated with the Direct-To operation. Therefore, the approximate remaining \$12,716 in solicitation costs resulted in a contribution by the NRSC to the Santini Committee and should have been reported as such.

By failing to attribute and report the solicitation costs of the Direct-To operation paid by the NRSC, the Santini Committee violated 2 U.S.C. § 434(b). These solicitation costs for the Direct-To operation are also included in the Santini Committee's

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9. In addition to the cost of the Direct-To mailing, the solicitation cost to the Santini Committee should also include the cost of the phone calls made to contributors who did not redesignate their contributions for Santini at the suggestion of the NRSC. However, the total costs of the telephone designation program (which involved the use of NRSC telephones and personnel) was not separately computed by the NRSC.

violation of 2 U.S.C. § 441a(f) for receipt of excessive contributions.

2. Direct-To Auto

a. September 2, 1986 mailing

The first version of the Direct-To Auto program is the only Direct-To operation for which the NRSC did not charge the recipient committees a cost of \$3.00 per successful contribution. In the Direct-To Auto solicitation, the contributors were asked to make a contribution to be divided among four candidates listed by state. For that solicitation, each candidate committee was charged \$.33 per contribution forwarded by the NRSC to the recipient committee, i.e., per successful solicitation. This amount was determined by estimating the cost of each mailing (\$1.32) and dividing it by four. The NRSC then charged for only successful solicitations, leaving the cost of unsuccessful solicitations unpaid for. Thus, here again, the amounts charged to each candidate committee were based on the number of contributions earmarked for the particular candidate rather than on the actual cost of the solicitation.

According to the NRSC, the cost of the mailing for the first version of the Direct-To Auto operation mailing was \$672,000. There were twenty-four different versions of the solicitation letters sent September 2. Each solicitation referred to "[o]ur Republican Senate candidates in" and then listed four states. Of the 96 references to a state, i.e., four states in each of 24 version of the letters, Nevada was referred to twelve times. Thus, the Nevada Senate race accounted for 12.5 percent of the

Senate races listed in the solicitation letters for the September 2 mailing. It may be concluded, therefore, that \$76,071 in solicitation costs for the Santini campaign were not paid for.

By failing to attribute and report the costs to the NRSC of the unsuccessful solicitations as contributions, the Santini Committee violated 2 U.S.C. § 434(b). The \$76,071 in solicitation costs for this version of the Direct-To Auto operation are also added the the amount of excessive contributions by the NRSC to the Santini Committee.

b. August 13, 1986 mailing

The only solicitation in the second version of the Direct-To Auto operation were candidate specific mailings and therefore, the cost of the mailings soliciting funds for the Santini Committee were required to be primarily borne by that Committee. The solicitation letters in this version of the Direct-To Auto operation specifically name the candidate to whom the recipient is requested to make an earmarked contribution. See Discussion of Direct-To Auto operation under the discussion of Direction or Control, section A(2), supra.

The NRSC sent 418,523 solicitation letters through this version of the Direct-To Auto operation. Letters requesting an earmarked contribution to the Santini Committee were sent to 106,981 names. Since solicitations on behalf of the Santini Committee made up approximately twenty-five percent of the letters sent out in this version of the Direct-To Auto operation, twenty-five percent of the total solicitation cost should be paid



by the Santini Committee. See MUR 2282. The total solicitation cost for this version of the Direct-To Auto operation was \$191,877. Thus, the Santini Committee's share of the solicitation costs should have been approximately twenty-five percent of \$191,877, or approximately \$49,043.76.

As noted above, the NRSC charged the Santini Committee only for the successful solicitations, using the three dollar per contribution rate. The Santini Committee received a total of 2,213 contributions and paid \$6,639 in solicitation costs to the NRSC. Because the Santini Committee's actual share of the solicitation costs was approximately \$49,043.76 and they paid only \$6,639, the NRSC absorbed approximately \$42,404.76 of the solicitation costs. Therefore, the approximately \$42,404.76 in remaining solicitation costs for the unsuccessful solicitations resulted in a contribution by the NRSC to the Santini Committee and should have been reported as such.

By failing to attribute and report the costs to the NRSC of the unsuccessful solicitations as contributions, the Santini Committee violated 2 U.S.C. § 434(b). The \$42,404.76 in solicitation costs for the Direct-To Auto operation are also added to the amount of excessive contributions the Santini Committee received from the NRSC.

### 3. Majority '86

As discussed above, the Majority '86 conduiting operation involved solicitations by letters and through telephone calls and personal contacts. The Santini Committee received \$75,575 from 90 contributors through the Majority '86 operation. The amount

of solicitation costs paid by the Santini Committee for these earmarked contributions was \$270. The solicitation costs were allocated on the three dollar per contribution basis.

Again, the Santini Committee paid only for successful solicitations. Clearly, the mail solicitations and phone calls the NRSC undertook in an effort to solicit earmarked contributions on behalf of Santini cost more than \$270. In the Direct-To operation discussed above, the solicitation costs were approximately 28% of the total amount of contributions earmarked for Santini. In the Direct-To Auto operation, the solicitation costs were determined to be about 25%. The Santini Committee received a total of \$75,575 from the Majority '86 operation. Using the three dollar per contribution figure, the NRSC billed the Santini Committee only \$270, or less than one half of 1% of the amount of contributions it received through this conduiting operation.

Using the figures that were provided by the NRSC, a more realistic solicitation costs figure can be determined. The NRSC raised a total of \$1,848,382 through the Majority '86 operation. Sixty-five percent of that amount, or \$1,201,419, was designated for specific candidates. Of the amount designated for specific candidates, \$75,575 or 6.3% was designated for Santini. The NRSC does not have records for the number and total cost of all Majority '86 solicitations because the solicitations included telephone and personal contacts for which no records are available. The Commission asked the NRSC to provide information as to the total cost of follow-up phone calls and the number and

total amount of contributions that were designated for the Santini Committee as a result of the phone calls, but the NRSC stated that it did not maintain this information.

The mail portion of the Majority '86 program involved 178,003 mail pieces at a total cost of \$414,172. The total cost figure represents the cost to the NRSC of the services of vendors, stationery and mailing costs. The mailing portion of the Majority '86 operation involved 16 communications soliciting contributions. Ten of these mailings were general mailings seeking contributions for the NRSC and six were candidate specific and mentioned particular candidates. The NRSC did not provide information as to the number of times Santini appeared in candidate-specific letters. The Commission also asked the NRSC to provide information as to the total number and amount of contributions received through the mail portion of the Majority '86 operation, the NRSC said that available records provide no breakdown of before and after telephone call contribution totals.

Because 65% of the total amount received through the Majority '86 operation was designated for specific candidates, at least 65% of the mailing cost can be attributed to those candidates. Thus, \$269,211 is the portion of the total mailing cost which can be attributed to the cost of the redesignated contributions. Accordingly, since Santini received 6.3% of the designated contributions, the Santini Committee should pay at least 6.3% of the portion of the solicitation costs attributable to the designated contributions. Thus, the Santini Committee's share of solicitation costs for the Majority '86 operation was at

least \$16,935. This figure is approximately 22.5% of the amount of contributions it received from the Majority '86 operation. This is in line with the estimated solicitation costs for the Direct-To and Direct-To Auto operations discussed above.

Because the Santini Committee's actual share of the solicitation costs should have been approximately \$16,935 and they were billed only \$270, the NRSC absorbed approximately \$16,665 of the solicitation costs. These solicitation costs paid by the NRSC resulted in a contribution by the NRSC to the Santini Committee and should have been reported as such.

By failing to report the costs of the unsuccessful solicitations as contributions from the NRSC, the Santini Committee violated 2 U.S.C. § 434(b). These solicitation costs for the Majority '86 operation are also added to the amount of excessive contributions by the Santini Committee received from the NRSC.

#### 4. Trust Program

The Santini Committee received \$113,457 from 122 contributions through the Trust operation. They paid three dollars per contribution for a total of \$366 in solicitation costs to the NRSC for these contributions. Based on the informal manner in which the NRSC conducted this program, it is not clear that the three dollar per contribution was an inadequate allocation of solicitation costs under the Trust operation.

As noted above, the Trust operation was run informally. The Trust operation involved a limited number of members with a low

annual turnover and NRSC communications with Trust members was usually on a personal basis, often at regularly scheduled Trust briefing meetings. Thus, there is no evidence of the NRSC incurring a big expense to solicit earmarked contributions through this conduiting operation. In addition, more than 95% of contributions transmitted through the Trust operation to the Santini Committee were in the form of contributor checks. Therefore, there was apparently little need for an additional effort to urge the contributions to redesignate their contributions. Accordingly, the violations involving solicitation costs does not include any additional allocation relating to the Trust Program. With regard to the Trust operation, no additional amount is included in the amount of excessive contributions by the NRSC to the Santini Committee.

5. Miscellaneous Conduiting

The Santini Committee received \$264,197.20 from the Miscellaneous Conduiting operation. Of that amount, \$235,901.66 was in the form of contributor checks and \$28,295.54 was in the form of NRSC checks. The Santini Committee was charged three dollars per contributions for every Miscellaneous Conduiting contribution received. The Santini Committee paid the NRSC \$1,353 for the contributions it received through the Miscellaneous Conduiting operation.

The Miscellaneous Conduiting involved both solicited and unsolicited earmarked contributions. There is no indication of what percentage of the contributions earmarked for Santini were unsolicited. And the NRSC stated that the operation did not

involve any specific solicitations. The Commission asked the NRSC to provide information on any specific solicitations the NRSC conducted through the Miscellaneous Conduiting operation but none were provided. Therefore, the NRSC spent an undetermined amount obtaining earmarked contribution through the Miscellaneous Conduiting operation.

In three of the other conduiting operations, it is clear that the NRSC's allocation of solicitation costs by charging the Santini Committee three dollars for every contribution earmarked for Santini did not result in an accurate allocation of solicitation costs. Based on the analysis of the other conduiting operations where the actual amount of solicitation costs was substantially higher than the \$3 per contribution charged by the NRSC, it is apparent that an undetermined amount of solicitation costs paid by the NRSC for the Miscellaneous Conduiting operation is attributable to the Santini Committee. In those three other operations the actual solicitation costs were around 25% of the amount of earmarked contributions received. But the NRSC only charged the Santini Committee \$1,353 -- about .5% -- of the amount of earmarked contributions it transmitted through the Miscellaneous Conduiting operation.

On the basis of the limited information available, it is not possible to determine the exact total amount of solicitation costs allocable to the Santini Committee. If the percentage ratio in the other conduiting programs (between 22% and 28%) were applied here, the amount would range from approximately \$58,000 to \$74,000. Some allowance would also need to be made for the

undetermined percentage of unsolicited contributions. But it is clear that the NRSC absorbed some amount of the solicitation costs of the earmarked contributions transmitted to the Santini Committee through the Miscellaneous Conduiting operation.

Accordingly, the Santini Committee violated 2 U.S.C. § 434(b) by failing to report the solicitation costs incurred by the NRSC through the Miscellaneous Conduiting operation on its behalf as contributions from the NRSC. As a result, an additional amount of solicitation costs relating to this operation should also be included in the Santini Committee's receipt of excessive contribution by the NRSC.

#### 6. Summary of Solicitation Costs

The NRSC made contributions to the Santini Committee in the form of solicitation costs through the Direct-To, Direct-To Auto, Majority '86, and Miscellaneous Conduiting operations. Therefore, there is probable cause to believe that the Santini Committee violated 2 U.S.C. § 434(b) for failing to report these solicitation costs as contributions from the NRSC.

#### 7. Summary of 2 U.S.C. § 441a(f) violation

The NRSC exercised direction or control over \$556,456.87 in contributions transmitted to the Santini Committee through its Direct-To conduiting program<sup>10</sup>. After deducting the NRSC's

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10. This excessive amount is made up of the following contributions: All \$71,627.33 earmarked contributions transmitted to the Santini Committee through the Direct-To operation; all \$346,304 earmarked contributions transmitted through the first version of the Direct-To Auto operation; all \$72,055 earmarked contributions transmitted to the Santini Committee through the second version of the Direct-To Auto operation; \$32,575 transmitted to the Santini Committee by NRSC

remaining contributions limit and remaining assigned coordinated expenditure limit, \$554,373.81 of that amount resulted in excessive contributions to the Santini Committee. Therefore, the Santini Committee violated 2 U.S.C. § 441a(f) by receiving \$554,373.81 in excessive contributions from the NRSC. In addition, the contributions made to the Santini Committee in the form of solicitation costs through the Direct-To, Direct-To Auto, Majority '86, and Miscellaneous Conduiting operations are also added to the amount of excessive contributions and are part of the Santini Committee's violation of 2 U.S.C. § 441a(f).

**C. Failure to report conduited contributions**

Pursuant to 11 C.F.R. § 110.6(c)(3)(1976), the intended recipient of a contribution for which there was a conduit "shall disclose on his next report each conduit through which the contribution passed." Section 434(b)(3)(A) of the Act requires a reporting political committee to identify each person (other than a political committee) whose contribution or contributions aggregate more than \$200 in the calendar year, along with the date and amount of such contribution, and 2 U.S.C. § 434(b)(3)(B) requires the committee to identify each political committee that contributes along with the date and amount.<sup>11</sup>

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(Footnote 10 continued from previous page)  
check through the Majority '86 operation; \$5,600 transmitted to the Santini Committee by NRSC check through the Trust operation; and \$28,295.54 transmitted to the Santini Committee by NRSC check through the Miscellaneous Conduiting operation.

11. The Santini Committee does disclose on its Detailed Summary Pages that it received \$432,746.58 in unitemized contributions, i.e., \$200 or less from an individual. Even if this figure is composed totally or largely of unitemized contributions that



The Santini Committee did not fully disclose all of the contributions it received from the NRSC through the Direct-To program. The information available in the reports of the Santini Committee and the responses of the NRSC indicate that the Santini Committee failed to report a large number of contributions as having passed through the NRSC.<sup>12</sup> The Santini Committee received a total of \$943,213.54 from the NRSC through the Direct-To program. However, the Santini Committee reports only disclose a total of \$452,831.84 in contributions for which the NRSC served as an intermediary or conduit.

For example, the following six contributions were listed on the NRSC's reports as earmarked contributions conduited through the NRSC:

Thomas M. Burnham	\$1,000
Charlotte Collins	\$1,000
A.G. Galt	\$1,000
David L. Gamble	\$1,000
Frederick A. Klingenstein	\$1,000
Alfred Loomis	\$1,000

The Santini Committee, however, did not disclose the NRSC as a conduit for the above contributions.

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(Footnote 11 continued from previous page)  
passed through the NRSC, there was no entry in the Santini Committee's reports for totals of unitemized contributions for which the NRSC was a conduit or intermediary.

12. It is not known to what extent the discrepancy is due to a failure to report the contributions at all and to what extent it is due to a failure to report the NRSC as a conduit. Copies of letters from the NRSC to the Santini Committee, dated in January and February, 1986, indicate that the NRSC was a conduit for contributions to the Santini campaign in the form of NRSC and contributor checks during those months, but the Santini Committee's reports do not disclose the receipt of conduited contributions during those months.

Based on the foregoing, there is probable cause to believe that the Santini Committee violated 11 C.F.R. § 110.6(c)(3) with respect to the apparent failure to report the NRSC as a conduit. There is also probable cause to believe that the Santini Committee violated 2 U.S.C. § 434(b) with respect to the apparent failure to report contributions.

**III. GENERAL COUNSEL'S RECOMMENDATIONS**

Find probable cause to believe that Jim Santini for Senate and J. Glen Sanford, as treasurer, violated 2 U.S.C. § 434(b); 11 C.F.R. § 110.6(d)(2); 2 U.S.C. § 441a(f); and 11 C.F.R. § 110.6(c)(3).

Date

10/8/91

  
Lawrence M. Noble  
General Counsel